Decision 02-03-063

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (Filed November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan. (U 39 E)	Application 00-11-056 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 02-02-051

On February 21, 2002, the Commission adopted Decision (D.) 02-02-051 (Decision). The Decision approved a "Rate Agreement" between the Commission and the California Department of Water Resources (DWR). The Rate Agreement will facilitate DWR's issuance of the bonds authorized by Water Code § 80130. The bond's proceeds will repay more than $ 10 billion of debt that DWR incurred to finance power purchases during the electricity crisis, including more than $ 6 billion owed to the State's General Fund.

On March 4, 2002, Pacific Gas & Electric Company (PG&E) filed an application for rehearing of the Decision (Application). No responses were filed to the Application. We have carefully considered all of the Application's

arguments and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, this order denies PG&E's application for rehearing. However, as explained below, we will modify the Decision to provide an opportunity for comment if the Commission authorizes changes to the material terms beyond those described in the Summary that is described in Section 7.10 of the Rate Agreement. We will also modify the Decision to add an additional Finding of Fact reflecting our basis in the record for not adopting modifications to the Rate Agreement that PG&E and other parties requested in their comments.

I. INTRODUCTION

The Commission and DWR entered into the Rate Agreement pursuant to the provisions of Assembly Bill No. 1 from the 2001-2002 First Extraordinary Session (AB 1X). That bill enacted Water Code section 80110, which, among other things, addresses the "charges" that will be levied to "recover" DWR's "revenue requirement," and provides, in part (emphasis added):

> The commission may enter into an agreement with the department with respect to charges . . ., and that agreement shall have the force and effect of a financing order adopted in accordance with . . . Section 840 [et seq.] of the Public Utilities Code, as determined by the commission.

In addition, Water Code Section 80130 requires, in part, that DWR:

> . . . establish a mechanism to ensure that bonds will be sold at investment grade ratings and repaid on a timely basis . . . . This mechanism may include, but is not limited to, an agreement between the department and the commission as described in Section 80110.

Pursuant to this statutory mandate, the Commission and DWR negotiated a Rate Agreement that was circulated for public review on January 31, 2002. Subsequently, the Commission approved the Rate Agreement in D.02-02-051. Among other things, the Rate Agreement specifies the procedures the

Commission will use to set "Bond Charges" and "Power Charges" for the purpose of recovering DWR's revenue requirement. The Rate Agreement also specifies how DWR will "advise the commission" regarding its revenue requirement.

By setting out specific procedures for these tasks and events, the Rate Agreement will facilitate the sale of bonds. As D.02-02-051 points out: "Simply put, DWR cannot sell the Bonds with investment grade ratings as required by the Act [AB1X] unless investors are confident that DWR will be able to timely pay Bond principal and interest. The Rate Agreement provides the necessary assurance." (Decision, at p. 27 (mimeo.).)

We will consider PG&E's specific claims of error below. Several general claims however are addressed here as an initial matter. The two main concerns the Application highlights in its introduction do not address the actual terms of the Rate Agreement. PG&E first claims that the Rate Agreement acts to "subordinate the financial health of PG&E" and "business customers to the recovery of DWR's costs." (Application, page 3.) The Rate Agreement addresses DWR's revenue requirements, not utility revenues. Section 6.1 (b) of the Rate Agreement in fact establishes that Bond Charges and Power Charges are a separate matter from utility rates. Second, the Application alleges that the Rate Agreement establishes a "largely secretive process for setting and revising DWR's rates[.]" PG&E does not refer to any portion of the Rate Agreement in support of its claim of secrecy. As the Decision explains on pages 32-33, certain of DWR's financial information will be made public, and appropriate procedures for public participation will be provided. Since pursuant to AB 1X the Commission will not decide the reasonableness of DWR's revenue requirements, it will not need to process the revenue requirements in the same way it processes a utility's general rate case.

Similarly the Application contains several allegations that do not recognize the statutory underpinnings and the purpose of the Rate Agreement's provisions. The claim that negotiations between DWR and the Commission were

somehow improper (Application, p.14) does not take into account that AB 1X directed the Commission and DWR to reach an agreement on how the Commission would establish charges. Claims that the Rate Agreement removes the authority of the Commission misunderstand the role AB 1X assigns to the Commission. It is important to recognize that AB 1X does not make DWR a public utility. AB 1X, for example, does not subject DWR to a requirement that it file tariffs, nor does it make DWR subject to regulation for its terms and condition of service, yet the Application implies the Rate Agreement and the Decision impermissibly "remove the authority of the Commission" in these areas (PG&E App. at 3.). (Cf., Pub. Util. Code, §§ 761-788.) Moreover, the claim that the Commission will "automatically adopt DWR's rates" (App. at 3) misunderstands the Rate Agreement's terms. The Rate Agreement provides that the Commission will establish rates with appropriate procedural protections within specific time frames.

Finally, it is important to recognize the role of an application for rehearing. The application is the vehicle by which a party exhausts its administrative remedies before seeking a judicial remedy. The Application represents the last opportunity the Commission has to reconsider and to revise D.02-02-051. The Commission's Rules of Practice and Procedure state: "The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission." (Rule 86.1) The Commission should not be forced to guess which parts of its decision might be in error or what the actual basis for an allegation of error might be.[1] In the discussion below, we try to address the application's allegations. At times, however, we cannot determine which portions of the Decision are allegedly improper or what legal problems underlie the Application's criticisms. In those

[1] Section 1732 of the Public Utilities Code provides that parties may not raise matters in any court that are not presented to the Commission in a petition for rehearing. That section also requires applications for rehearing to "set forth specifically" the ground or grounds on which the applicant considers the decision or order to be unlawful.

cases, we must reject the application's arguments pursuant to Rule 86.1 and Section 1732 because they did not provide us with an adequate opportunity to review and correct our order.

II. DISCUSSION

A. In Order for an "Agreement" Under AB1X to Facilitate the Sale of Bonds, that Agreement Must be Binding

Portions of the Rate Agreement are irrevocable, and cannot be altered, even with the consent of DWR and the Commission. The remainder of the Agreement can only be terminated or amended by mutual consent of the parties until DWR's bonds and all other Bond Related Costs required to be paid by the Department under the Financing Documents have been paid. PG&E argues that the Commission cannot enter into a binding Rate Agreement. According to the Application, the Rate Agreement "impermissibly removes the Commission's independent authority under the Public Utilities Code and the California Constitution," because it may not be modified or terminated unilaterally by the Commission. Similarly, PG&E asserts Sections 2.2(a) and (c) of the Rate Agreement, in which the Commission represents and warrants that it has full power and authority to bind itself and future Commissions to comply with all the terms and provisions of the Rate Agreement, and that the Rate Agreement is enforceable against future Commissions, are in error.

PG&E cites to Re Pacific Gas and Electric Company (Diablo Canyon) (1988) 30 CPUC 2d 189 at 223-225, as support for its claim. The Application claims that "it does not make legal or policy sense for the CPUC to agree in the Rate Agreement to preclude itself and future Commissions from making future changes in the agreement or DWR ratemaking which are unrelated to recovery of DWR's Bond Charges." (PG&E App. at 5.) According to PG&E, other than Sections 5.1(a) and (b) relating to recovery of DWR's Bond Charges, no other sections of the Rate Agreement need "financing order-like"

irrevocability. PG&E suggests revising the Rate Agreement Decision, particularly Conclusion of Law 46, to make clear that, despite its express terms, the agreement does not bind the Commission or future Commissions regarding amendments modifications or termination of the agreement.

Contrary to the Application's claims, neither public policy nor the requirement of the bond transaction[2] support making the Rate Agreement, with the exception of sections 5.1 (a) and 5.1 (b), subject to unilateral amendment or termination by the Commission. The Decision explains that "the mechanisms created by the Rate Agreement as a whole are necessary for [the contemplated] financial transactions, for example, to provide credit enhancement." (Decision, p. 29.) In addition, "in order to ensure timely repayment of Bond principal and interest, which is a prerequisite to obtaining investment-grade ratings for the Bonds as required by the Act, it is necessary for the Rate Agreement to provide for the recovery of Department Costs[,]" as well as Bond Costs.[3] (Decision, at p. 29.) DWR's comments in the record clearly indicate that the Rate Agreement as a whole "is an important element of the security for the proposed bonds, and is a key component of the credit rating analysis." (DWR Decision Comments, at p. 2.) DWR states that the "mechanisms established pursuant to the Rate Agreement are needed to allow [DWR] to achieve investment grade ratings on its bonds." (DWR Rate Agreement Comments, p. 3.) If those mechanisms were subject to unilateral amendment or termination by the Commission, rather than amendment by mutual consent, as the Rate Agreement provides, an investment grade rating could not be achieved.[4]

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[2] PG&E has not, like DWR, been involved in discussions with the rating agencies concerning the kinds of provisions that are needed to achieve an investment grade rating for the bonds.

[3] Certainty about the recovery of Department Costs, as well as Bond Costs is required because, in some circumstances, revenues generated by Bond Charges may be invaded to ensure there are sufficient revenues to pay DWR's Priority Long-Term Power Contracts, which are normally paid out of Power Charges. (Decision, p. 29 (mimeo.).)

[4] PG&E lists a number of sections which it claims shall not have binding effect. Many of the sections, beyond just 5.1 (a) and (b), in fact deal directly with the bonds and Bond Charges. For example, Section 8.3 of the Rate Agreement permits the Bond Trustee to enforce the Bond Charge provisions contained in

The Commission and DWR both determined that AB 1X authorized this aspect of the Rate Agreement. (Decision, pp. 58-60, DWR Rate Agreement Comments, p. 3, DWR Draft Decision Comments, p. 2.) Read as a whole, the provisions of AB 1X establish that, in order to assure timely repayment of bonds, and to obtain investment grade ratings, the Commission and DWR may set forth in an agreement mechanisms not subject to unilateral revision by the Commission -- unlike many other actions by the Commission which can be reversed or reviewed by later Commission action.[5] Water Code Section 80130 clearly establishes that the mechanism agreed upon by the Commission and DWR should be the foundation for DWR's entering into a financial transaction where it can promise timely repayment of bonds. According to AB 1X, the agreed-upon mechanism should be certain enough to earn an investment grade rating.

In addition, Water Code Section 80110 grants the Commission express authority under AB1X to enter into an "agreement" with DWR with respect to charges under the Public Utilities Code section 451. The authority to enter into an "agreement" necessarily implies the ability to make the agreement binding on and enforceable against the parties thereto. If the Commission could unilaterally determine, and then re-determine how charges would be established under section 451, an agreement would be superfluous. In order to avoid reading this provision out of the statute it must be understood to allow the Commission to commit to a particular mechanism, so bonds can be sold. In order to fulfill the statutory mandate to create an agreement that facilitates the issuance of bonds, the

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Article V on behalf of the bondholders. Other cited sections of the Rate Agreement deal with Power Charges which, as explained above, are a legitimate concern of bondholders, which must be dealt with to ensure an investment grade rating for the bonds. Finally, a number of the cited sections of the Rate Agreement contain only promises of DWR.

[5] The fact that the Ordering Paragraphs are headed "Interim Order" does not mean that the Decision is not a final decision of the Commission, or that the Rate Agreement is subject to unilateral modification by the Commission. Rather, consistent with usual Commission practice, it simply indicates that this order does not close the docket in these consolidated proceedings, as many other issues remain to be resolved in this multi-faceted docket.

Commission has interpreted its authority to enter into an "agreement" to include authority to establish how that agreement can be mutually amended or terminated.

Diablo Canyon does indicate that the Commission found that it generally lacks the power to bind future Commissions, but that case is distinguishable on a number of grounds. Most importantly, as discussed above, AB 1X gives the Commission authority to bind future Commissions in a Rate Agreement with DWR. In addition, in Diablo Canyon the Commission was approving a settlement agreement to which the Commission was not a party but which nevertheless would have bound future Commissions as to the manner in which a regulated utility's rate of return is decided had not the Commission's authority been made clear. See Diablo Canyon (1988) 30 CPUC 2d 189 at 223-225 (1988 CPUC Lexis 886, *90-97). But as the Commission noted in Diablo Canyon, "A settlement, when adopted by us, is not a contract between parties but a decision of the Commission. [Citations omitted.]" Id. at * 101. Here, however, the Commission itself has entered into an agreement with DWR, and that agreement was entered into pursuant to specific Legislative authority. None of the cases relied upon by the Commission in Diablo Canyon involved a situation where the Legislature granted specific authority to two state agencies to enter into an agreement. Moreover, as discussed below, the Rate Agreement does not pre-determine rates (as the Diablo Canyon decision did).

The Application attempts to rebut the Decision's explanation of the nature of the Rate Agreement by claiming the Rate Agreement impermissibly authorizes the Commission to contract away its discretion in reviewing and approving DWR rates and charges. According to PG&E, under the "reserved powers" doctrine, states "possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." PG&E contends that contracts that surrender an essential attribute of state sovereignty, such as the Commission's police power authority over ratemaking, are subject to a judicial finding that they are void *ab initio*.

(PG&E App. at 11, citing Morrison Homes Corp. v. City of Pleasanton (1976) 58 Cal.App.3d 724, 734, and United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 22.)

In support of this argument, PG&E again makes vague assertions that the Commission is divesting itself of its ratemaking powers. The Application fails to state specifically how the Commission is abdicating its regulatory responsibilities to any extent, let alone in a way that would make the "reserved powers" doctrine applicable. For example, in the Morrison Homes case, cited by PG&E, the Court notes "the general rule that a municipality may not 'contract away' its legislative and governmental functions." Id., at 734 (citing McNeil v. City of South Pasadena (1913) 166 Cal. 153, 155; 10 McQuillin, Municipal Corporations (3d ed. 1996 rev. volume) § 29.07, pp. 244-247.) "The effect of the rule, however, is to void only a contract which amounts to a city's 'surrender,' or 'abnegation,' of its *control* of a properly municipal function." Id. The Court went on to find the rule inapplicable to the contract in question, however, since it found no provision to support the inference that it involved a "surrender" by the City of its control of the annexation process or of its sewer operation.

Contrary to PG&E's assertions, the Rate Agreement does not remove the independent ratemaking authority of the Commission. Moreover, the Commission is required, not by the Rate Agreement, but by various provisions of AB1X (including §§ 80110, 80130, and 80134) to set rates to recover DWR's Bond-Related and Department Costs. Under these provisions, Section 451 authority that the Commission does not exercise remains under state control. Under AB 1X, the Commission retains authority under Public Utilities Code section 451, with the exception that DWR is responsible for determining whether its costs are just and reasonable. The Rate Agreement provides that the Commission will set rates, based on DWR's revenue requirements, with appropriate procedural protections within specific time frames. This fulfills the

Commission's obligations under section 451. The Rate Agreement specifically does not contain provisions that pre-determine what rates will be set.

Moreover, Section 7.4 of the Rate Agreement acknowledges the Commission's exclusive authority to allocate DWR's costs among customer classes and service territories, and to set rates to recover these costs. The Rate Agreement also preserves the Commission's authority to determine the extent or timing of rate changes that may be required. PG&E fails to point to any specific provision in the Rate Agreement to support its contention that the Commission has "surrendered" its ratemaking authority. Had PG&E done so, we would have had a chance to consider its interpretation, and to correct any error identified. Accordingly, PG&E's argument fails to demonstrate legal error in the Decision.

B. The Rate Agreement's Provisions Reflect AB 1X, which is the Relevant Statutory Authority

PG&E argues that several sections of the Rate Agreement "require the Commission to automatically impose major rate changes requested by DWR" and that "nothing in the Rate Agreement provides PG&E's customers, utilities or other interested parties with prior notice, discovery, access to DWR's books and records, the right to audit DWR's request, or an opportunity for hearings regarding DWR's rate changes or revenue requirement requests." (PG&E App. at 6.) PG&E argues that "there is no provision for specific notice to customers, and the specific requirements of the Public Utilities Code regarding notice of major rate changes, filing of tariffs, and the opportunity for evidentiary hearings and discovery on major rate changes are not explicitly called forth."

According to PG&E, "AB 1X did not exempt DWR from the Public Utilities Code" and that these allegedly "automatic" rate changes are contrary to Sections 454 and 1701.1(a) of the Public Utilities Code. (PG&E App. at 7.) In

addition, PG&E contends that the Rate Agreement must be revised to apply to DWR's current revenue requirement.[6]

The Application fails to acknowledges that the Legislature has made DWR exclusively responsible for determining whether its costs are just and reasonable. PG&E's arguments overstate the relationship between DWR and the Public Utilities Code. DWR is not a public utility, and while Water Code § 80110 states that the Commission's authority as set forth in Section 451 of the Public Utilities Code applies, it does not subject DWR to regulation under the entire Public Utilities Code. The kinds of procedures that typically apply to a utility request for a change in its rates (bill-insert notices to customers, discovery and evidentiary hearings about the justification and reasonableness of the need for additional revenues, i.e. the level of the revenue requirement) do not apply to the Commission's proceedings to consider a DWR revenue requirement, as AB 1X makes clear. In a DWR revenue requirement proceeding the Commission allocates the revenue requirement among service territories and customer classes. Precisely what kind of procedures will be required to resolve these issues cannot be determined in advance. PG&E has made no showing (nor can it) that the Rate Agreement will preclude the Commission from following any of the procedures required by statute, or by due process, in handling a change in DWR's Revenue Requirement.

Nor has PG&E shown that the Rate Agreement will preclude DWR from following any of the procedures required by law in determining whether its costs are just and reasonable. The Rate Agreement provides that DWR will conduct whatever procedures are required by law to determine that its costs are just and reasonable within the meaning of Public Util. Code § 451. PG&E claims

[6] In footnote 5 of PG&E's Application, PG&E seems to indicate that there are some ratemaking and accounting policies embodied in the decision concerning DWR's current revenue requirement (D.02-02-052) which may conflict with the Rate Agreement, and that the Rate Agreement should be compared and conformed to those policies. The Rate Agreement, however, governs future DWR revenue requirement proceedings.

that a Superior Court in PG&E v. CDWR, Case No. 01-CS-01200, "has ruled that DWR's determination is not exempt from the California APA." However, this is not an accurate characterization of those proceedings. At this stage, the Court has only overruled the State's demurrer, stating "the Court cannot conclude at this stage of the proceedings that the APA does not apply. There is nothing in the statutory scheme of Assembly Bill X1, which created section 80110, that leads to an 'inescapable conclusion' that the APA is inapplicable. [Citation omitted.]" PG&E v. CDWR, Case No. 01-CS01200, Superior Court of California, County of Sacramento, February 4, 2001. The Application suggests that we enshrine PG&E's view of the potential outcome of this litigation in the Rate Agreement. We find that result to be too inflexible. The Agreement already provides that DWR "will conduct whatever procedures are required by law" in making its determination that its costs are just and reasonable, there is no need to limit that requirement to a specific set of procedures now.

Finally, the Application claims that the Rate Agreement should encompass DWR's current revenue requirement proceeding. This claim, too, does not establish legal error in this Decision. AB 1X requires that the Rate Agreement be designed to facilitate the issuance of bonds. This is accomplished here, by setting forth how future revenue requirements will be established, which as shown by the comments of DWR, is sufficient for this purpose. Because the Rate Agreement is an agreement between the Commission and DWR, it is not error for those parties to decide that only future revenue requirement proceedings will be covered by the agreement. Second, applying the Rate Agreement to the current revenue requirement makes no policy sense. The Commission has already issued a decision implementing DWR's current revenue requirement, and PG&E's request is in effect asking the Commission to repeat the process. The Commission and DWR reached agreement on the terms of the Rate Agreement towards the end of the revenue requirement process, and could not have applied the Rate Agreement's provisions without restarting the proceeding. To the extent PG&E

alleges the revenue requirement decision, D.02-02-052, is in error, it should raise any allegations of legal error in an application for rehearing of that decision.[7]

C. The Commission May Authorize its General Counsel to Act within Specified Parameters

According to PG&E, the Rate Agreement and the Decision unlawfully delegate "ratemaking" powers to the Commission's General Counsel. PG&E takes issue with Section 7.10 of the Rate Agreement, which delegates authority to approve "material changes" to the Summary of material terms of the Financing Documents to the Commission's designee. The Application argues that the delegation of this task to its General Counsel is unlawful.[8] PG&E further argues that it is unlawful for the Commission to authorize changes in the material terms of the Financing Documents without opportunity for public comment.

PG&E misconstrues Section 7.10 of the Rate Agreement and the Decision. The Commission's designee is only authorized to approve changes to a material term that are *within* guidelines that have already been approved by the Commission. (Ordering Paragraph 5.) Section 7.10 states that DWR must obtain the approval of the Commission's designee if it makes any material change to any material terms. Section 7.10 must be read in conjunction with the Decision and Ordering Paragraphs 4-6. The Decision makes clear that only the full Commission can authorize any changes to the material terms beyond those described in the Summary. PG&E fails to demonstrate how this delegation is anything other than ministerial, let alone how it is equivalent to the function of "ratemaking."[9]

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[7] In fact, PG&E has filed an application for rehearing of that decision, D.02-02-052, and any allegations of legal error PG&E may raise as to sufficiency of process will be addressed in a separate response.

[8] PG&E also claims in a footnote that Section 8.3 of the Rate Agreement, which provides for assignment of DWR's rights to a third-party Trustee to enforce the Commission's covenants in the Rate Agreement when there is a default under the Financing Documents, is unlawful if it is intended to delegate the Commission's ratemaking authority to the Trustee. However, Section 8.3 of the Rate Agreement provides that the Trustee shall not be greater than the rights of DWR. Section 7.4 further provides that as long as the Agreement is in effect, DWR will not attempt to fix or establish charges on retail end use customers. PG&E has not shown, nor can it, that Section 8.3 of the Rate Agreement unlawfully delegates any of the Commission ratemaking authority to the Trustee.

[9] In response to PG&E's cryptic contention that the terms of the Financing Documents are "material" to

The Application further claims that minimum standards of due process do not permit the Commission, whether through its General Counsel or otherwise, to approve changes in the Financing Documents without opportunity for public comment. This claim misunderstands the nature of the Commission's role as a participant in the bond transaction that is being undertaken by DWR and the State Treasurer's Office (STO). As the Decision explains, the Commission is not a decision-maker for issues relating to the bond transaction. The Rate Agreement provides the Commission with a consultative role because we have an interest in keeping ratepayer costs low. (Decision at 36-37.) But we can only "participate" in the process and advise DWR and the STO, who have "responsibility for issuing the bonds." (Decision at 36, mimeo, Cf., Water Code § 80132.) These circumstances are reflected in the process designed to convey our views. We will consider the recommendations of staff, and direct staff to take certain positions when they participate in the drafting of Financing Documents, but we will do so outside the scope of a formal proceeding, just as we direct staff to take positions in other contexts. The Application is incorrect to assert that regulated entities have a right to participate in the process by which the Commission directs its staff.

Even though there is no due process violation in the mechanism described above, we are of the view that public circulation of documents is a good practice. Accordingly, we will provide a public process with an opportunity for comment if the Commission authorizes changes to the material terms beyond those described in the Summary. Such opportunity for comment would have to take into account the probable need for very prompt action by the Commission on any DWR request to enter into Financing Documents with material terms that fall outside the parameters specified in the Summary. The amount of time available

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the "Commission's exercise of its ratemaking authority under the Rate Agreement." (PG&E App. at 10.) We simply note that we will set rates under the terms of the Rate Agreement, and the terms of the bond deal will not interfere with that responsibility.

for comment may be comparable to the amount of time for comment available on the original Summary. As explained in the Decision, any such approval of additional authority to the General Counsel would occur outside a formal proceeding. However, it would take place at a Commission meeting, where the public may comment on matters before the Commission. Most likely, such approval would be granted upon consideration of a report from the General Counsel. In that situation, the General Counsel could circulate DWR's request to those persons appearing on the service list in this proceeding, with an opportunity to submit comments. The General Counsel could then summarize the substance of the comments in the report to the Commission prior to the Commission's vote. Regardless of what precise method we will use, the Decision shall be modified to state that relevant documents provided to the Commission will be made public, and an opportunity to comment will be provided.

D. Uncertain Hypothetical Scenarios Involving Future Rate Effects Do Not Demonstrate Legal Error in the Decision

Section VI of the Application begins with a contention that costs will be borne by retail end use customers under the Rate Agreement and the Decision, particularly Bond Charges and Bond Related Costs, which bear no relationship to the power that is actually delivered to those customers under the statutory power sales contracts established by AB 1X. For all the reasons stated in the Decision, the recovery of Bond Related Costs through Bond Charges in the manner provided for by the Rate Agreement is proper and authorized under AB 1X.

PG&E then argues that the imposition of DWR costs on "utilities and customers" as authorized by the Rate Agreement and Decision unlawfully confiscates the property of ratepayers and utilities under the California and U.S. Constitutions. (App. at 12.)

Although PG&E complains of "several places" in the Rate Agreement and Decision which raise problems, PG&E only refers specifically to

three particular aspects of the Decision. While those examples will be addressed, PG&E's general allegation that the Decision and Rate Agreement constitute a taking is too vague to permit or warrant a response, and accordingly fails to meet the requirements of Pub. Util. Code § 1732 and Rule 86.1.

PG&E's first argues that "the Rate Agreement fails to address Water Code Section 80110, which caps residential electric rates for up to 130 percent of existing baseline quantities until DWR has fully recovered all its costs of power." (PG&E App. at 12.) PG&E claims that "to the extent that" the interaction of Section 6.1(b) of the Rate Agreement and the residential rate cap in Water Code Section 80110 "results in massive shifting of DWR costs from the residential class to other classes of customers, either the rates of those other customer classes will need to be raised to recover the shortfall, or the DWR rates will need to be reduced or further financed to ensure that existing utility costs of service are fully recovered from those same customers." According to PG&E, "unless DWR's Bond Charges and Power Charges are reduced, deferred or further financed, the effect of Water Code Section 80110 would be to unlawfully confiscate the property of non-residential ratepayers and/or the authorized revenues of the utilities to serve those ratepayers." (PG&E App. at 12.)

Second, PG&E claims that "nothing in the Rate Agreement, other than the language of Section 6.1(b), ensures that the DWR Bond Charges and Power Charges will collect only revenues attributable to DWR's costs and will not divert revenues attributable to the utilities' rates and costs of service." (PG&E App. at 12.) PG&E also argues that the Decision "purports to confirm that the Bond Charges are the property of DWR under Water Code Sections 80110 and 80112, Public Utilities Code Section 840, *et seq.,* and Rate Agreement Section 5.1(b)." According to PG&E, "DWR's 'property right' to Bond Charges and Power Charges is limited to that specifically created by Water Code Section 80112 and not based on the reference to Public Utilities Code Section 840, *et seq.* in

Water Code Section 80110, which relates solely to the irrevocability of a financing order ('force and effect'), not its substantive content." (Id.)

PG&E's arguments amount to a claim that the Rate Agreement is in error because an improper result might occur if the Commission acted illegally in the future. The Application asserts that the Rate Agreement, in combination with certain future factual scenarios which may or may not occur, and certain possible Commission responses to those scenarios, might prompt the Commission to set rates in a way that PG&E contends would be confiscatory. These arguments claim error based on the assumption that the Commission will illegally allocate DWR Bond Charges and Power Charges in the future, will allow DWR to recover costs to which it is not entitled, or will "divert" utility revenue to DWR. These possible results are too hypothetical and speculative to establish any constitutional weakness in the Decision. "The due process clause has been applied to prevent governmental destruction of existing economic values." (Market Street Railway Co. v. Railroad Commission of California (1945) 324 U.S. 548, 567, emphasis added.) Any alleged damage would be "speculative, remote imaginary contingent or merely possible," and thus, not recoverable under a takings claim. (City of Commerce v. National Starch &Chemical Corp. (1981) 118 Cal.App.3d 1, 13; see also Arnerich v. Almaden Vineyards Corp. (1942) 52 Cal.App.2d 265, 272.)

Furthermore, in connection with its argument about the rate cap on residential usage up to 130 percent of baseline, PG&E cites to no authority for the proposition that rates needed to recover costs can be so high as to constitute a confiscation of ratepayer property.

PG&E asserts that it is "troublesome" that the Rate Agreement establishes a property right based on Pub. Util. Code section 840 et seq. PG&E reads the reference in Water Code Section 80110 to Public Util. Code Section 840 et seq. too narrowly. The Legislature did not limit its reference solely to those provisions making financing orders irrevocable. Instead, it referred to all of Article 5.5, (commencing with Section 840) of Chapter 4 of Part 1 of Division 1 of

the Public Utilities Code. We view this reference to Article 5.5 as broader than just making an order irrevocable, but to allow the Bond Charge to be established by a financing order –i.e., a Bond Charge that can be pledged. ((E.g., Pub. Util. Code, Section 840, Subd. (9)(1), Pub. Util. Code, Section (a).) A financing order deals with securitization of future revenue, namely the creation of a stream of revenue that may be sold or pledged, with the proceeds of the sale or pledge being used to defray current costs. Provisions that clearly establish Bond Charges as property of DWR, in a way that allows them to be pledged as security, are a proper way of ensuring that bonds can be sold at investment grade ratings. This is especially the case when one California utility is in bankruptcy, and a deliberate definition of what property is DWR's and what property is the utility's may be required to make the Bond Charges pledgeable as security.

For its third example, PG&E points to Conclusion of Law 30 of the Decision, which PG&E claims "appears to authorize the DWR to represent in its bond offering that Bond Charges may be imposed on power sold by a utility rather than solely on power sold by DWR. Although the intent of this section appears to be to allow DWR to recover its Bond Charges from customers even if it has assigned all its existing power contracts to third parties, the language of the Decision appears to imply something more broad." (PG&E App. at 12.) Indeed, the provisions of the Rate Agreement described in Conclusion of Law 30 provide for each end-use customer's bond charge to be based on the aggregate amount of electric power sold to that end use customer by DWR and the utility, even before DWR has assigned any of its existing power contracts. The Decision, and the Rate Agreement's definition of "Bond Charges" make this clear. Unfortunately, PG&E's argument as to why this might be improper is simply too vague to respond to, and accordingly fails to meet the requirements of Pub. Util. Code section 1732 and Rule 86.1.

E. The Rate Agreement Decision Addresses All Material Issues and is not Procedurally Defective

The Decision responds specifically and generally to the comments filed by the parties on the Draft Rate Agreement and the Draft Decision. At page 62 of the Decision, the Commission notes that the Draft Decision reflected the substance of comments on the Draft Rate Agreement, although it did not contain specific citations to the comments. It further notes that the comments on the Draft Rate Agreement and Draft Decision are reflected, as appropriate, in the Final Decision.

The Decision responds to specific issues raised by the parties in numerous places. PG&E claims that the Decision "arbitrarily and capriciously" fails to address most of the comments and issues raised by parties in their comments to the Draft Rate Agreement and Draft Decision. PG&E argues that the Decision should be revised to ensure that all the comments summarized in Appendix A of the Decision are addressed on the merits.

The Application does not cite any authority for the claim that the Commission is subject to a legal requirement that it respond specifically to each of the comments on a proposed decision. The relevant principle of law, in fact, requires us to make separately stated findings of fact and conclusions of law on all issues that are material to our order or decision. (Pub. Util. Code § 1705.) This requirement, in turn, assists a reviewing court in determining whether the Commission acted arbitrarily and capriciously in making its decision. See, e.g., Greyhound Lines, Inc. v. Pub. Util. Comm. 65 Cal.2d 811, 813; Calif. Motor Transport Co. v. Pub. Util. Comm. 59 Cal. 2d 270, 274-275. PG&E has not demonstrated that the Decision fails to address material issues, and is not supported by findings based on the record.

We have reviewed the comments filed by PG&E on the Draft Rate Agreement and the Proposed Decision, and believe that all of the points raised therein are accurately summarized in Appendix A of the Decision. We have also

reviewed the Decision and find that PG&E's comments are addressed (generally and specifically) at pages 15, 18, 29-32, 34, 38, 47-48, 58-59, and 62.[10] PG&E's suggestion that the Commission include the Bond Charge issues in the proceeding to determine the extent to which direct access customers should pay a fee associated with the costs that DWR has incurred was noted in Appendix A. However, the Commission did not adopt this suggestion in its discussion on page 34, because the Commission need not determine now in what future proceeding such issues should be addressed. PG&E fails to demonstrate how this is material to this Decision. In addition, PG&E commented that two findings of fact and conclusions of law in the Proposed Decision concerning the benefit of DWR's power purchases had no support in the record.[11] While the Decision does cite to comments in the record which support these findings at pages 47-48, we note that we did not address PG&E's argument that these statements "appear intended to undermine any effort by the Commission to exercise its independent authority to seek renegotiated changes to the price and non-price terms of DWR's existing power contracts and to seek regulatory changes to such contracts at FERC." However, PG&E failed to substantiate this claim, and the Commission explained in several places in the Decision that it believes the Rate Agreement will facilitate renegotiation of DWR's existing power contracts.

PG&E fails to point to any specific comment which requires further response. The purpose of an application for rehearing is to alert the Commission to error so that it may be addressed. Since PG&E's argument fails to specify which comments require additional response, we cannot further review our

[10] PG&E and other parties requested certain modifications to the Rate Agreement, which we declined to make in the Decision. DWR stated in its comments that the Rate Agreement should be adopted "in the form published by the Commission" (with one minor change suggested by DWR). (DWR Comments Dated Feb. 19, 2002.) DWR noted that the proposed Rate Agreement is a key component in the credit rating analysis. We find this provides a basis in the record supporting our decision not to modify the Rate Agreement, and we will modify the Decision to add a Finding of Fact reflecting this.

[11] We note that PG&E does not claim in its application for rehearing that these findings and conclusions, or any other findings of fact and conclusions of law, are not based on sufficient evidence in the record, nor does PG&E make any specific claims that the Decision is not supported by the findings.

decision or correct it. Thus, the Application fails to meet the requirements of Public Utilities Code § 1732 and Rule 86.1.

III. CONCLUSION

We have carefully considered all of the Application's arguments and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we deny PG&E's application for rehearing. However, for the reasons explained above, we will modify the Decision to provide an opportunity for comment if the Commission authorizes changes to the material terms beyond those described in the Summary that is described in Section 7.10 of the Rate Agreement. We also modify the Decision to add an additional Finding of Fact reflecting our basis in the record for not adopting modifications to the Rate Agreement that PG&E and other parties requested in their comments.

THEREFORE, IT IS ORDERED that

1. Decision 02-02-051 shall be modified as follows:

   (a) The third and fourth sentences in the first full paragraph on page 37 (which continues to page 38) of the Decision which states, "The Commission may alter its delegation of authority to the General Counsel beyond the parameters expressed in the Summary without an opportunity for parties to comment on that. This is because we will not be making a formal Commission decision" shall be deleted. It shall be replaced with the following text: "The Commission may alter its delegation of authority to the General Counsel beyond the parameters expressed in the Summary. Relevant documents provided to the Commission will be made public and we will provide an opportunity to comment on them. We will not spell out any precise method here, but note that such opportunity for comment would have to take into account the probable need for very prompt action by the Commission on any DWR request to enter into Financing Documents with material terms that fall outside the parameters specified in the Summary.

At this point we do not intend to make a formal Commission decision."

(b) Ordering Paragraph Number 6 shall be modified to read: "The Commission may, from time to time, authorize changes to the material terms beyond those described in the Summary. Relevant documents provided to the Commission will be made public and we will provide an opportunity to comment on them."

(c) Finding of Fact No. 75 shall be added to the Decision, stating: "Subject to the modification mentioned in the previous Finding of Fact, DWR recommends that the Rate Agreement be adopted as published by the Commission with the Draft Decision, and notes that the proposed Rate Agreement will facilitate the obtaining of an investment grade rating."

2. PG&E's application for rehearing of Decision 02-02-051 as thus modified is denied.

This order is effective today.

Dated March 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners